No. 398.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

VS.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Appellant's Reply Brief.

WM. SINGER, JR.,
Of Counsel for Appellant.

Filed February ..... *1898.*

..... *Clerk.*

H. S. CROCKER COMPANY, PRINTERS, S. F.

No. 398.

United States Circuit Court of Appeals,

NINTH CIRCUIT.

OUTHERN PACIFIC RAILROAD CO.,
Appellant,

vs.

TTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Appellant's Reply Brief.

PLAY UPON THE WORD "GRANTED."

Section 6 of the appellant's granting Act provides at the "land *hereby granted* shall not be liable to sale entry or pre-emption"; and the appellees contend that e word "*granted*", as there used, means the primary nds only.

This play upon the word "*granted*" originated, I lieve, in a letter addressed by Mr. President Cleveland Guilford Miller, construing the same section in

Northern Pacific's Act (13 St. 365); which letter received very general publication during the year 1886, and accomplished the order of August 15th 1887 set up in the pleadings here—which was a general order restoring the indemnity lands of all railroad grants, not theretofore selected or restored because of the final adjustment of the grant, or satisfaction of the quantity granted.

I have filed with the clerk of this court a copy (the only copy I have) of an official report made by Commissioner Stockslager on March 8th 1888, entitled "Statement showing land grants made by Congress to aid in the construction of railroads" etc.; which contains a tabular statement of each land grant made by Congress to aid in railroad building, the date and extent of withdrawals and restorations of lands therefor, and much other interesting information. This "Statement" shows that, with the single exception of the Texas Pacific grant (foot of page 20), the *indemnity lands were withdrawn whereever the primary lands were;* and that prior to the orders of restoration made in August 1887, the indemnity lands were not restored except for satisfaction of the quantity granted, forfeiture of the grant, and the like. This "Statement" is referred to for the purpose of showing the uniform construction of the withdrawal requirements of these Acts, prior to the orders of August 1887.

While the provision under consideration here is that the "land hereby granted shall not be liable" to preemption, section 12 of the Texas Pacific Act (16 St. 573) provides that the primary limits only be with-

drawn; and it has been suggested by counsel for the appellees that this may be taken as the expression of congressional desire that indemnity lands be not withdrawn for any grant. Our answer to this suggestion is that the Act makes two independent land grants, each to a different beneficiary—one to the Texas Pacific to construct a road from Yuma west to San Diego, the other to another company to aid in building a road from Yuma northwest to Mojave; the only difference between the two grants, in terms and conditions, being in *respect of the withdrawal provisions.* After setting forth the terms and conditions of the Texas Pacific grant, including withdrawal of the primary lands only, section 23 makes the other land grant according to the *terms and conditions of this Act at bar* (July 27th 1866)—instead of, as is usually done where two separate grants are made by the same Act, making the two grants upon the *same* terms and conditions; which, at least, seems to indicate a *congressional distinction* between the withdrawal provisions of section 6 in the appellant's Act, and the restricted withdrawal expressed for the Texas Pacific's grant.

In his decision of the **Chicago, St. Paul, etc., case, IX L. D. 467-469,** rendered on October 7th 1889, Secretary Noble in construing the meaning of the phrases "*land hereby granted*", "embraced in the *grant of lands*", and like phrases, as used in the congressional Acts granting railroad lands, made the following interesting review:

"In the Kansas Pacific case (112 U. S. 421) it is said that by the indemnity clause '*a right to select*' was given,

and in the Cedar Rapids case (110 U. S. 39) it is said that this *right* accrues as against the United States when the map of the entire line is filed. Now, then, on June 9, 1865, when the map was filed, we have the company entitled to its place lands and the '*right*' to select lieu lands as against the United States, fixed and vested, and if the land officers had made withdrawal as Congress says they ought to have done, also with the '*right*' to select *as against all subsequent settlers.* This, then, was the grant conferred by Congress, and of which it intended the company should have the benefit—ten sections of land per mile on each side of the road, to be obtained either within the primary or secondary limits; but ten sections the company was to have. On this plain statement it ought to be clear that the *right* both to place and lieu lands was conferred by the grant, and therefore, necessarily, they were in the language of the Act of 1873 'embraced in the grant of lands' made to aid in the construction of this road."

Secretary Noble's views are confirmed in the case of the **United States v. Colton Marble and Lime Co., 146 U. S. 617-618,** wherein, construing the indemnity grant at bar, it was said:

"It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. The *right of selection* was a prospective right, and if it was to be fully exercised no adverse title could be created to any lands within the *indemnity limits.* * * * * That prospective right would be impaired by the transfer of the title of a single tract."

So in the **Barnes Case** (51 N. W. Rep. 401) it was said:

"The *indemnity* provision does not make an additional grant, but simply points out the method by which lands *already granted* may be identified."

And in **Chicago Co. v. Sioux City Co., 3 McC. 300,** it was said:

"The lands in place and the *indemnity* lands were *granted* by Congress for precisely the same purpose. The intention of the grantor with respect to them was *exactly the same.* The mode of making the title of the trustee specific was different" etc.

This doctrine does not conflict with the rule in the Tax cases that the grantee has no *taxable interest* in the indemnity lands until selection made and approved; nor does this doctrine conflict with the rule in actions in ejectment or suits to quiet title, that such actions or suits cannot be maintained for indemnity lands *until after selection* made and approved.

Secretary Noble, continuing with his opinion **(IX L. D. 468–469)** said:

"But it is urged that by the use of the expression '*grant of lands*', Congress really meant granted lands, or lands within the primary limits of the grant. I can not concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and lands other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to. By the 9th section of Texas Pacific (16 St. 576), it is provided that if, in the too near approach to the Mexican border, the number of sections to which the Company is entitled can not be selected on the line of the road, then a like quantity of lands may be selected elsewhere; 'Provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid.' Here *indemnity lands* to be selected for other lost lands are included in the category of lands '*hereby granted.*'

Also in the case of the Burlington and Missouri grant, the only one of quantity without lateral limits recalled, where the land is to be obtained by *selection* anywhere along the line of the road, the language of the Act is that (Sec. 19, Act July 2, 1864, 13 St. 356), 'there be and hereby is *granted*,' provided the Company accepts '*this grant*' within one year, when the Secretary of the Interior 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S. 334, construing the Act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the Company to select them anywhere along the general direction of the road within lines perpendicular to it at each end. * *

So in 24 Fed. Rep. p. 892, Barney v. Winona, it was held that the expression 'lands which may have been *granted* to the Territory or State of Minnesota,' include *all lands* the title to which had passed to the Territory or State of Minnesota, whether those lands were lands in place or *indemnity lands*, and that the word *granted* has the broad, rather than the narrow, signification.

So in St. Paul v. Winona Railroad, 112 U. S. 730, referring to the significant fact that both Acts there quoted speak of additional sections 'to be *selected*, a word wholly inapplicable to lands in place,' the Court said, 'we think, therefore, that these *additional lands granted* to the appellant * * * * are lands to be selected.'

These citations, doubtless, might be multiplied largely, but they are sufficient to show that the expressions '*lands granted*,' '*granted lands*,' '*lands within the grant*,' and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant."

These views of Secretary Noble are sustained by the decisions in the **Wiggs' case, 14 Saw. 574; Orton case, 16 Saw. 157; Barnes case, 51 N. W. Rep. 386; Araiza case, 57 Fed. Rep. 104.** And in **Woods v. Beach, 156 U. S.**

550–551, where the land in suit was within the *indemnity limits*, and the Act required the "Secretary to withdraw from market the *lands granted*", it was held:

"These withdrawals were not merely *executive* acts, but the latter one, at least, was in obedience to the *direct command of Congress.*"

AUTHORITIES ON LACHES, CITED AGAINST US.

Three decisions are cited by counsel to show that the delays complained of here constituted such laches as bars relief to appellant against appellees; of which decisions we have to say:

1. In *Gallagher v. Caldwell*, *145 U. S.*, *368–376*, cited by counsel, after saying (p. 373) "that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some *change in the condition or relations of the property or the parties*", the Court said, at page 375:

"It seems to us that equity forbids that homestead right, created fourteen years before, for which land office fees only were paid, which were once absolutely terminated, and which may never have been resurrected, should at this late day be permitted to disturb a title, legally perfect, created by the general government, after a decision adverse to any resurrection of such right, for which full value is paid, and on the face of which *costly improvements have been made*, and which now represents *enormous value*, to the creation of which appellant has, apparently, contributed nothing."

The difference between the facts there and here is the difference between *laches* and *inconsequential tardiness;* for there there was, and here there is not, a

"change in the condition or relation of the property or (and) the parties".

2. The grant construed in *Cedar Rapids v. Herring*, *110 U. S.*, *27–42*, relied on by appellants here, provided for withdrawal when a map "definitely showing this modified line of their road" was filed (p. 41); and that map was not filed "until December 1st 1867, three years and a half after the passage of the Act. * * * * It was during this delay of three years and a half that the entries were made under which the defendants hold the land" (p. 41). With these facts before it the Court (p. 41) held:

> "No *right* existed in the plaintiff to all these lands, or to any specific sections of them, during this period. No obligation of the government to *withdraw them* from sale arose until plaintiff *filed a map*, definitely showing the entire line of its road, in the General Land Office. The defendants purchased from officers who had the power to sell. They acquired a valid title."

The distinction between that case and this is too apparent to admit of comment. It will be remembered that his Cedar Rapids case was decided at a time when the withdrawal was regarded as dating from the *executive order* of withdrawal, instead of from the date the map was approved and accepted, as held later; which explains why an entry made a few days after the map was filed, but "before any action of the Secretary could be had to withdraw the lands" (p. 41), was sustained.

3. The case of *Curtner* v. *U. S 149 U. S. 662–679*, relied on by appellant has no application at all here.

That suit was brought in 1883 to cancel patents for land certified to California during the years 1870–1873 (p. 665), being odd sections within the *primary limits* of the Central Pacific grant, opposite a section of railroad definitely located in 1870 (p. 664). If railroad land, *legal title* passed to the Central Pacific in 1870—and if not railroad land then *legal title* passed to the State during the years 1870–1873; so that the *legal title*, as well as all equitable interest, had passed from the United States many years before the suit was brought. The adverse claimants under the State and railroad title were barred, as against each other, by the statute of limitation of actions—and the Court held (p. 662):

"When, in a suit in equity brought by the United States to set aside and cancel patents of public land issued by the Land Department, no fraud being charged, it appears that the suit is brought for the benefit of private persons, and the Government has no interest in the result, the United States are barred from bringing the suit if the persons for whose benefit the suit is brought would be barred."

Respectfully submitted,

WM. SINGER JR.

Of counsel for appellant.